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Ontario. Court of Appeal

The Florence Mining Company

v.

The Cobalt Lake Mining Company

Judgment of the Court of Appeal

of Ontario.

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THE TRUE STORY

OF THE CASE OF

The Florence Mining Company

AS SHEWN BY

The Unanimous Judgment of the Court of Appeal of Ontario

DECLARING:

(1) That there was no foundation for the claim put forward by the plaintiffs;

(2) That they had no reason to complain of any act of the Department of Lands, Forests and Mines; and

(3) That the legislation complained of was proper, justifiable and valid legislation.

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THE FLORENCE MINING COMPANY

v.

THE COBALT LAKE MINING COMPANY.

Copy of judgment of Court of Appeal, delivered April 5th, 1909, by Moss, C. J. O. The first matter for consideration on this appeal is the constitution and frame of the action and the nature and extent of the relief which, assuming them to be entitled to any, the plaintiffs can be awarded on the present record.

By Letters Patent under the Great Seal of the Province, dated the 15th day of January, 1907, the Crown, in consideration of the payment of $1,085,000, granted to the defendants in fee a parcel of land covered with water situate in the Township of Coleman, containing 55 acres, more or less, described as being composed of Cobalt Lake Mining Location, being land covered with water of part of Cobalt Lake, together with the mines, minerals and mining rights thereon and thereunder, and being all that part of the land covered with the water of Cobalt Lake lying southerly, easterly and southwesterly of the southeasterly limit of the right of way and Cobalt Station grounds of the Temiskaming and Northern Ontario Railway, excepting that portion of land covered with water of the lake designated as Mining Location J. S. 55, containing four acres, more or less, granted by Letters Patent, dated 31st July, 1905, to certain named persons.

The plaintiffs claiming as the assignees of one W. J. Green, allege that on the 7th of March, 1906, the said Green while engaged in explorations under the waters of the lake, made a discovery of valuable ore or mineral in place under part of the lake, and thereupon staked out a mining claim in accordance with the Mining Act, embracing twenty acres or thereabouts of the lands covered with the waters of the lake, thereby becoming, as they allege, entitled to the said Mining Claim and the materials thereunder, and afterwards and within due time sought to procure the due filing of the claim in the office of the Recorder of Mining Claims in the proper Mining District, but he was unsuccessful, owing to the refusal of the Recorder to receive and record his claim and the refusal of the Bureau of Mines or the Minister of the Department to entertain or consider his claim; that notwithstanding the existence of the said claim, the Crown assumed to sell and grant to the defendants the lands described in the Letters Patent, including therein the portion embraced in the said Mining Claim; that such sale was without any legislative authority and the Letters Patent were issued erroneously and by mistake and improvidently, and that notwithstanding the said sale and issue of Letters Patent, the plaintiffs are entitled to the parcel of land described in the claim of the said W. J. Green. The plaintiffs claim (1) a declaration that the Letters Patent were issued erroneously, by mistake and improvidently, and are utterly void as against the plaintiffs, and that the plaintiffs are entitled to the lands and minerals, (2) a declaration that the defendant[illegible]ghts, if any, under the Letters Patent, are subject to the plaintiffs' said rights, (3) an

injunction restraining the defendants, their servants, workmen or agents, from extracting or removing ore or minerals from the claim or interfering with the plaintiffs' exclusive right of possession, (4) an account of all ore or minerals that may be extracted or removed from the claim, (5) a judgment setting aside as *ultra vires* and void the Letters Patent in favour of the defendants as against the plaintiffs, or in the alternative confining the operation thereof to the lands therein described other than those claimed by the plaintiffs, (6) costs, (7) further and other relief.

The Crown is not a party to the action. True, the Attorney-General was represented at the trial and the argument of the appeal, but that was by reason of a notice under the Judicature Act (sec. 60), because of the plaintiffs having called into question the constitutional validity of certain Acts of the Legislature, to which further reference will be made.

The presence of the Attorney-General or his representative under this provision does not of course enlarge the jurisdiction of the Court in respect of any substantial relief sought in this action. In that respect, the action must still be regarded as one to which the Crown is not a party. It is obvious, therefore, that the interposition of the Court must be confined to such relief as may be awarded in the absence of the Crown as a party to the record.

A long line of decisions has settled that an action to declare void a patent for land on the ground that it was issued through fraud or in error or improvidence, may be maintained and that measure of relief granted, at the suit of an individual aggrieved by the issue of such patent, and to such an action the Attor-

ney-General as representing the Crown is not a necessary party: Martyn *v.* Kennedy (1853) 4 Gr. 61: Stevens *v.* Cook (1864) 10 Gr. 410. See also Farah *v.* Glen Lake Mining Co. (1908) 17, O.L.R. 1.

But in such cases the relief is limited to declaring the patent void, leaving the parties to stand to one another as if the patent had never been issued, their final rights in respect of the land being left to be determined and settled by the Crown, to which the lands are restored by the avoidance of the patent.

The Court is not called upon, and in the absence of the Crown as a party to the record cannot be called upon, to exercise the jurisdiction which is vested in it by section 26 (7) of the Judicature Act, to decree the issue of Letters Patent from the Crown to rightful claimants. It is not necessary to enter upon a discussion as to the powers possessed by the Court under this provision, or to consider whether it applies to Letters Patent granting Crown lands, for in this case the record is not so framed or constituted as to parties as to enable such relief to be granted. Nor, in the absence of the Crown, can the Court undertake to make any declaration as to the ultimate title or right of the plaintiffs, for the reason that no such declaration could have any binding effect upon the Crown's right in the premises. The utmost to which the Court should go in this direction, is to enquire into the plaintiffs' claim to the extent necessary to ascertain whether they have a reasonable ground for invoking the jurisdiction of the Court to declare the Patent void in whole or in part as having issued through error or improvidence: Farmer *v.* Livingstone (1883) 8, S.C.R., 140. Fraud is not alleged or proved in this case.

The Court being satisfied that the plaintiffs have shewn an interest in the land existing before and at the time of the issue of the Letters Patent (Mutchmore *v.* Davis (1868) 14 Gr. 346 in the Court of Error and Appeal) which *prima facie* appears to entitle him to obtain a grant thereof from the Crown, and that the defendants' patent issued either through error or improvidence, may sweep it out of the way and restore the *status quo*.

But it cannot be expected that on this record the Court will go further and adjudge as to the respective titles of the Crown, the plaintiffs or the defendants.

The next question then is, has it been made to appear that at the date of the issue of the Letters Patent to the defendants, the plaintiffs were possessed of or entitled to, such an interest in the portion of the patented lands claimed by them as entitled them to ask the interposition of the Court in their favour? The learned trial Judge did not pass upon this question. The defendants dispute the plaintiffs' status and present a number of objections, some of which are formidable, if not insurmountable. They point out that the plaintiffs' interest, if any, is that claimed by their assignor, W. J. Green, as a prospector and explorer holding a miner's license by virtue of an alleged discovery of valuable ore or mineral in place under the waters of Cobalt Lake, and they say that at the time of the alleged discovery neither Green nor anyone working for him held a miner's license, and that Cobalt Lake was withdrawn by the Lieutenant-Governor in Council from sale, location or exploration, under the provisions of the Mines Act, and that Green and those associated with him were aware of that fact

or could have ascertained the fact if they had made proper inquiry, but they deliberately refrained from doing so; that whatever may have been done in the way of exploration or discovery was done without the authority of a miner's license, and was conducted in direct contravention of the prohibition of the Mines Act against exploration on lands of the Crown withdrawn from sale, location or exploration, and any supposed discovery made under such circumstances conferred no right to a Mining Claim under the Act. The defendants say further, that no discovery of valuable ore or mineral in place was actually made, and that the provisions of the Mines Act and the Regulations made thereunder with regard to discovery, staking, proof of claim and inspection, were not complied with and the claim was never presented, recorded or inspected in such manner as to entitle Green to assert under the Act any title to a Mining Claim situate under the waters of Cobalt Lake, or to confer on him any right thereto. The defendants further say that upon presentation of the claim for record in the office of the Mining Recorder, it was rightly rejected by the Recorder because it purported to be a claim of discovery in Cobalt Lake, which was not open for exploration, and because he was under instruction not to receive claims in respect of it, that his action was confirmed by the officers of the Bureau of Mines, and that the Minister of Lands, Forests and Mines rejected the claim for the same reasons.

Now in order to obtain the recognition by the Crown of a right in respect of a Mining Claim, it was incumbent on the claimant to place himself in the position of one who had fully or substantially ful-

filled all the requirements of the Mines Act and the Regulations thereunder.

The primary requisites at the date of the alleged discovery were the possession of a miner's license and discovery made on Crown lands not withdrawn from location or exploration; Mines Act, R.S.O., Cap. 36, sec. 9, and sections 45, 46, and 47 as amended by the Act, 61 Vict. Cap. 11, secs. 1 and 2. Section 9 reads that any person may explore for minerals on any Crown lands except such as may have been withdrawn from sale, location or exploration, but a reference to the other sections shows that the person spoken of is a person holding a license. See also the regulations approved by Order-in-Council of April 5th, 1905; clauses 1, 12, 13, 15 and 16.

It is plain that the explorations leading to the alleged discovery were all made before Green or anyone assisting him in the work had procured a miner's license, and it was not until they believed themselves to be on the eve of a discovery of valuable mineral that the withdrawal of a core from the diamond drill was suspended until a miner's license was hurriedly obtained. Then, when the withdrawal was actually made no Inspector was present to verify the core as one *bona fide* taken from the place, though probably the omission to have an Inspector there might have been remedied later on by the withdrawal of another core in the presence of an Inspector. But assuming the regularity of these proceedings, they could be of no avail to create rights if the land was withdrawn from location or exploration, section 47. Whether it was or not, depends on the true construction of three Orders-in-Council of the 14th and 21st of Augus

and the 30th of October, 1905, as reflected in the light of an Act of the Legislature, 6 Edw. VII., Cap. 12.

Section 33 of The Mines Act (R.S.O., Cap. 36) provided that where a part or section of the Province was shewn or reported to be rich in mines or minerals, the Lieutenant-Governor-in-Council might withdraw the whole or a portion thereof from sale or lease or the prospecting of veins, lodes, or other deposits of ores or minerals therein by the use of a diamond drill or otherwise, under the direction of the Commissioner of Crown Lands (now the Minister of Lands, Forests and Mines), and might fix or offer the same for sale by public auction.

The Order-in-Council of the 14th of August, 1905, directed that together with other specified property of the Crown "the lakes known as Cobalt and Kerr lakes, situated in the Township of Coleman, be withdrawn from exploration for mines and minerals and from sale, lease or location." This treatment of Cobalt Lake, as well as previous dealings in regard to portions of it, seems to import the view that the provisions of the Act and of the regulations with regard to discovery, staking, proof of claim, recording, etc., were applicable to lands covered by a large body of water, and were not confined to surface lands. Unquestionably, such provisions as those relating to the planting and maintenance of discovery and marking posts cannot be satisfactorily complied with so as to ensure permanence where deep water covers the land upon which the discovery is said to have been made. Where, as in this instance, ..e posts were merely planted in the ice, all traces of the point of discovery and of the supposed boundaries of the claim are obliterated with the breaking up of the ice.

The Order-in-Council, however, left no doubt as to the intention of the Crown with regard to the lakes mentioned, viz., that they were not to be subject to exploration for mines or minerals. By means of it, at all events, they were made prohibited territory for explorers and prospectors, and were also removed from the list of lands open for location, lease or sale.

While that prohibition existed it was not open to any person to make a discovery upon which he could validly maintain a claim under sections 26 to 33 having regard to sections 9, 33, 46, 47 and 48 of the Mines Act. And this quite apart from the difficulties, some of which have already been alluded to, surrounding the marking of the place of discovery, the placing of permanent posts shewing the boundaries of the claim, and the proof thereof for the purposes of recording.

The Order-in-Council of the 28th of August, 1905, after setting forth that the Townships of Coleman and Bucke, Lorrain and Hudson in the District of Nipissing were shewn to be rich in ores and minerals, directed that such parts of the said Townships as had not already been leased or sold be "withdrawn from sale and lease" under the Mines Act, and be set apart under section 33, not interfering with the rights of anyone who had theretofore made application for mining lands in the said townships. No specific mention is made of Cobalt and Kerr Lakes, which had been specially dealt with by the Order-in-Council of the 14th of August.

There is nothing in the Order-in-Council of the 28th August to indicate an intention to supercede the prior order as regards the withdrawal of these lakes from "exploration for mines and minerals." To that

extent, at all events, the first order was left to its operation on these lakes, and while the unsold and unleased parts of the townships were placed under section 33, the lakes still remained withdrawn from exploration, and so under the prohibition contained in sections 9 and 47.

The Order-in-Council of the 30th of October, 1905, dealt only with the effect of the Order-in-Council of the 28th of August. Its purpose was to enable licensed miners to do what was requisite in order to acquire a mining claim upon any of the open lands in the township, and to record it subject to the specified conditions and restrictions.

But it did not authorize or assume to authorize the receiving or recording of a mining claim in respect of a part of the Township which was withdrawn from exploration and was therefore still under the prohibition of sections 9 and 47. The testimony of Mr. G. T. Smith, the Mining Inspector and Recorder for the District, supports the view that this was the intention. He shows that he received his instructions from the Department of Bureau of Mines that the lakes were withdrawn from exploration accompanied by a copy of the Order-in-Council on or about the 18th of August, 1905, and those instructions were never afterwards countermanded; that no claim was thereafter presented to him for record until the 8th of March, 1906, when Green's was presented, and he declined to receive or record it because Cobalt Lake was withdrawn from exploration.

As to this the learned trial Judge says: "It is plain that the Inspector considered that Cobalt Lake was not open for prospecting, and that the same opinion was shared by the officers of the Department, including the

Minister," and this appears to be a fair and proper inference from the facts and circumstances in evidence.

Strengthening this view is the Act of the Legislature, 6 Edw. VII., Cap. VII, by section 1 of which it is enacted that the Order-in-Council of the 14th of August, 1905, is confirmed and declared to have been and now to be binding and effectual for the purposes therein mentioned. This Act received the assent of the Lieutenant-Governor on the 14th of May, 1906, rather more than two months after the refusal to record the claim on which the plaintiffs rely, and it is argued that effect should not be given to it to their prejudice. In view, however, of the actual situation before and at the time when Green and those associated with him assumed to make explorations of Cobalt Lake, their course of conduct is difficult to understand.

Assuming that it was the intention that Cobalt Lake should continue and remain withdrawn from exploration, an enquiry from the Department of the Bureau of Mines or from the Inspector and Recorder of the District whether that was the case, would have elicited an affirmative answer. But according to Green's testimony, he appears to have deliberately refrained from addressing the question to anyone.

He is described in the statement of claim as a broker, but from his testimony it appears that for some time he practised law and had acquired a good deal of experience in mining law. In January, 1906, he consulted a legal gentleman practising law in Toronto, about forming a syndicate to prospect at Cobalt. He was introduced to a Major Gordon, and there was a discussion about the chances of finding mineral on Cobalt Lake, and Gordon said he was certain he could find a vein of mineral in the Lake.

Green then went to the Bureau of Mines, and enquired for information relating to the Cobalt District. He saw one of the clerks, a young woman, and was given several pamphlets, one or two mining reports and the rules and regulations. He told the clerk that he wanted all the information they could give him relating to the Cobalt District. She handed him the pamphlets and told him that everything was contained there except a map of what claims or sections were open for location, but that he would find the map probably at the Recorded's office at Haileybury.

He then went to Haileybury to the Mining Recorder's office, and saw a young woman clerk in charge of the office. He asked for a map shewing what claims were open for location, and was handed a map of claims shewing sections marked. On the map appeared sections marked with a capital "A." The clerk told him the sections so marked indicated the sections applied for. From the rules and regulations and the map, he says, he came to the conclusion that Cobalt Lake was open for exploration. He and Major Gordon then set up a diamond drill on Cobalt Lake, and worked there for some weeks.

Neither of them had a miner's license. On cross-examination he said that when he went to the Bureau of Mines he didn't see the Minister or his Deputy. He did not think it was necessary to see anybody who was appointed to give out information. He did not make any inquiry at that time as to whether or not Cobalt Lake was open. He made no special enquiry about Cobalt Lake; simply asked for the literature and all information. He made no inquiry about Orders-in-Council. He made

no special enquiries at Haileybury about Cobalt Lake. He asked the clerk at Haileybury if the map was up to date, and she replied, "Yes," She said it was made up every two or three days. He merely asked her the question, "Is this up to date?" and she said, "Yes." He did not direct her atention to Cobalt Lake nor mention any special place where he was going to prospect. Then without more, the diamond drill was placed on the ice and operations were begun in Cobalt Lake. Now if Green was misled he had only himself to blame. A plain, direct question either at the Bureau of Mines or Haileybury would have undoubtedly elicited the information that Cobalt Lake was not open for prospecting. But evidently to suit his own purposes he did not desire to put the direct question.

There was nothing misleading in the information he did obtain. The regulations were of course applicable to all mining districts. The first clause directs attention to the fact that no exploring is to be done on lands withdrawn from sale, location or "exploration." And clause 16 repeats verbatim the proviso of section 47 of the Act against marking or staking a mining claim on Crown lands withdrawn from location or exploration. The map furnished him showed a condition entirely consistent with the intention and practical working of the Orders-in-Council of the 14th of August and the 30th of October.

The sections or lots actually applied for out of the parts of the township in respect of which the Order-in-Council of the 30th of October authorized the Recorder to record claims, were marked on the office map from day to day as they came in, and it is not suggested that the map was inaccurate. A frank question would have

led to a full explanation, but for some mysterious reason it was not asked. In these circumstances the plaintiffs have nothing to blame the Department or Bureau of Mines for. They present no valid ground or reason for saying that effect should not be given to the intention of the Crown with regard to Cobalt Lake. It follows that what was assumed to be done by Green and his associates by way of exploration and alleged discovery, marking and staking, did not create a right to a mining claim under the Mines Act. That being so, it is hardly necessary to say that what is shown to have been afterwards done or attempted to be done by them in the way of insisting upon recognition of the claim, is immaterial and need not be considered. The Crown never receded from the position which was taken on its behalf the moment Green's claim was presented, that Cobalt Lake being withdrawn there was no claim to be considered. And afterwards, acting under the authority of section 33 of the Mines Act, a sale was made to the Defendants. The result is that the Plaintiffs have no status to impeach the sale or the letters patent issued in pursuance thereof.

On these grounds the judgment appealed from should be upheld. But if these grounds should not prevail there still remains the questions of the defendants' position as purchasers for value, and the effect of the Act of the Legislature, 7 Edw. VII., Cap. 15.

That the defendants became purchasers in good faith and for value, the evidence leaves no doubt. Apparently they had no notice of the plaintiffs' claim until after the acceptance of the tender and payment of the deposit, but before the payment of the balance of the purchase money and the issue of the Letters Patent they were aware that the plaintiffs were claim-

ing the portion of Cobalt Lake in respect of which this action is brought.

And assuming that the plaintiffs were able to establish a status entitling them to impeach the sale, the defendants would derive no protection from the plea of purchasers for value without notice

But they would still be entitled to the benefit of the Act, 7 Edw. VII., Cap. 15.

Many objections have been urged with much force and ability against the constitutional validity and the legal effect of this Act.

It is impossible, however, to conclude that it is a private and not a general Act, and that it was not intended to validate and confirm the sale and grant of the lands comprised in the Letters Patent and of all the mines and minerals being and lying in and under the lands and all mining rights therein and thereto, and to vest the property therein and thereto in the defendants as and from the date of the sale, absolutely freed from all claims and demands of every nature whatsoever in respect of or arising from any discovery, location or staking. Having regard to what is known to have transpired before and up to the time of the passing of the Act, it is not possible to ignore the . . nce of the enactment, or to seek to treat it as in. .icable to the plaintiffs' asserted claim to impeach the grant to the defendants.

And unless the enactment was beyond the legislative authority of the Legislature, it must be taken as absolutely concluding any claim to the lands to which the plaintiffs assert title in this action.

It was urged that the legislation was *ultra vires* and incompetent because it was enacted during the

pendency of this action and its effect if valid is to usurp the functions of the Courts and to declare the rights of individuals in property in derogation of the ordinary law of the Province.

But the subject matter of the enactment falls clearly within the category of property and civil rights. The right claimed by the plaintiffs is, if anything, a right in property within the Province. So the right to bring an action is a civil right. And both have by sec. 92 of the B. N. A. Act been made subject to the legislative authority of the Provincial Legislature.

And where there is jurisdiction over the subject matter, arguments founded on alleged hardship or injustice can have no weight. As said by Lord Herschell in the Attorney-General of Canada v. the Attorney-General of the Provinces (1898) A. C. 700, when discussing the question of the relative legislative powers and authority of the Parliament of Canada and the Legislatures of the Provinces under the B. N. A. Act (p. 713) "'The suggestion that the power might be abused so as to amount to a practical confiscation of property does not warrant the imposition by the Courts of any limits upon the absolute power of legislation conferred. The supreme legislative power in relation to any subject matter is always capable of abuse, but it is not to be assumed that it will be improperly used, if it is, the only remedy is an appeal to those by whom the Legislature is elected."

Lord Herschell added, "If, however, the Legislature purports to confer upon others proprietary rights where it possesses none itself, that in their Lordships' opinion is not an exercise of the legislative jurisdiction conferred by section 91."

But this latter remark was made in relation to the respective powers and property rights of the Dominion and the Provinces, and has no application to a case like the present where the lands were Crown Lands the property of the Province.

Even supposing the opinion of the Court to be that the Letters Patent issued in error and improvidently, the Act must still remain as a Legislative declaration of the validity of the sale. And in that respect the Act would form a bar to the plaintiffs' alleged rights.

Another point, not however raised by the pleadings or argued in the Court below, was suggested in argument of the appeal. It was contended that the grant to the defendants did not comprise or carry with it a grant of the precious or "royal" metals. The grant is of the land covered with water composed of Cobalt Lake mining location together with the mines, minerals and mining rights, thereon and thereunder.

The Mines Act, R.S.O. Cap. 36, sec. 2 (6), defines mining rights as meaning ores, mines and minerals on or under any land where the same are dealt with separately from the surface of the land; see also the Mines Act, 1906, Sec. 2 (9), (10) and (12). Here the Letters Patent are issued subject to the provisions of sections 188 to 221 inclusive of the Mines Act, 1906, and there is a grant both of the land and of the mining rights as well as of the mines and minerals thereon and thereunder; words which, having regard to the nature of the territory and the purposes of the grant, seem broad and comprehensive enough, one might suppose, to justify a construction that would include metals and minerals of every description. Sections 3, 4 and 5 of the Mines Act, R.S.O., Cap. 36,

and sections 2 (16) and 3 (1) and (5) of the Mines Act, 1906, seem to indicate an intention to withdraw from the Crown any right under its prerogative title to the precious metals. But if this be not so, the plaintiffs' case is not thereby advanced, for their claim, if any, is under the Mines Act, R.S.O., Cap. 36, and any grant to them would not be more extensive in terms or effect than the grant made to the defendants. However, the point is not properly open to the plaintiffs on this appeal.

There may be a question whether the plaintiffs are entitled to maintain this action as assignees of Green. Section 47 of the Mines Act, R.S.O., Cap. 36, enables a licensee who has discovered a vein or other deposit of ore or mineral to mark or stake out a mining claim, providing that it is on Crown Lands, not withdrawn from location or exploration, and "to transfer his interest therein to another licensee."

This appears to be the only provision in force when the transfer was made to the plaintiffs enabling a discoverer to transfer his interest to another. He does not appear to be authorized to make a transfer of a mining claim arising in respect of Crown lands withdrawn from exploration. The question whether, assuming that Green did acquire mining rights in or under Cobalt Lake, notwithstanding that it was withdrawn from exploration, he could make a valid transfer of such rights so as to enable his transferee to maintain an action in respect of them, was not raised or discussed, and it is not necessary to the disposal of the appeal that it should be considered.

The appeal must be dismissed.